Editor's note: 83 I.D. 609

UNITED STATES

v.

GLENN C. BOLINDER AND

L. O. TURNER, ET AL.

IBLA 75-342 Decided December 6, 1976

Appeal from the decision of Administrative Law Judge Robert W. Mesch dismissing Government mining contest complaints Utah 10693 and Utah 10696.

Affirmed, as modified.

1. Mining Claims: Locatability of Mineral: Generally-- Mining Claims: Specific Mineral Involved: Generally

A valuable deposit of geodes, round stones with crystalline centers and composed of recognized mineral substances, which possess an economic value in trade and the ornamental

arts, and which are being removed by actual mining operations, is subject to location under the mining laws. South Dakota Mining CO. v. McDonald, 30 L.D. 357 (1900), distinguished.

2. Contests and Protests: Generally--Mining Claims: Contests--Rules of Practice: Government Contests

In a mining contest, a matter not charged in the complaint may only be considered by the Administrative Law Judge if it was raised at the hearing without objection and the contestee was fully aware that the issue was raised.

3. Mining Claims: Common Varieties of Minerals: Generally

In order to establish that a type of stone material is not a common variety under the Act of July 23, 1955, a mining claimant must demonstrate that: (1) the mineral deposit has a unique property, and (2) the unique property gives the deposit a distinct and special value. Where evidence establishes

that geodes in a particular deposit have unique properties distinguishable from other types of stones which give the deposit of geodes a distinct and special value, the fact that the geodes may be similar to geodes from other areas which have similar properties and values is not sufficient evidence to establish that the deposit of geodes is a common variety of stone within the meaning of the Act of July 23, 1955.

APPEARANCES: Reid W. Neilson, Esq., Assistant Regional Solicitor, Department of the Interior, Salt Lake City, Utah, for appellant-contestant;

Craig S. Schwender, Esq., Tooele, Utah, for appellees-contestees.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

This is an appeal by the Government from a decision of Administrative Law Judge Robert W. Mesch, dated January 9, 1975, dismissing mining contest complaints Utah 10693 and 10696. Utah 10693 was filed by the Bureau of Land Management (BLM) against Glenn C. Bolinder and challenged the validity of his Eureka No. 1 and Lucky Strike No. 1 lode mining claims. Utah 10696 was filed by BLM against L. O. Turner and H. C. Ross and challenged the validity of their Treasure Chest Nos. 1-6 lode mining claims.

Each complaint listed the same charges as follows:

1. Minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery.

2. Geodes are not subject to mineral location.

3. Lands embraced within the subject claims are non-mineral in character.

Upon the timely filing of answers denying the charges, a consolidated hearing was held before Judge Mesch on September 25, 1974. At the hearing and thereafter BLM argued that the claims were also invalid because the geodes on the claims are a "common variety" of geode within the meaning of 30 U.S.C. § 611 (1970) and because appellees have filed lode claims on placer material.

In his decision, Judge Mesch held that the issue of proper location as lode or placer claims and the issue of common variety were not properly raised in the contest complaints. He found that geodes are subject to location under the mining laws, ruled that the Government had not presented a prima facie case on the issue of the discovery of a valuable mineral deposit, and determined that the land was mineral in character. He then dismissed the complaints because the evidence and the law did not "support the charges."

BLM argues that Judge Mesch erred in finding geodes to be a locatable mineral, in ruling that the issue of common variety was not included in the complaints, and in not holding that the geodes on the claims are a common variety of geode. BLM also asserts that the claims should be invalidated as lode claims on placer material. The arguments of BLM fail to persuade us that the decision of Judge Mesch dismissing the complaints was in error.

The testimony at the hearing indicates that the geodes taken from appellees' mining claims are commonly known as "Dugway" geodes (Tr. 83-84). 1/ All the witnesses agreed that Dugway geodes are similar to each other and to geodes found in other parts of the United States and in Mexico (e.g., Tr. 24-26, 75-76, 112).

Judge Mesch noted the following about the testimony on geodes (Dec. 6):

> The uncontradicted evidence in this case shows that the substances or materials found inside the geodes are minerals (Tr. 40); that when cut or broken open, different stones and crystals are found in varying degrees (Tr. 110); that the interior of the geodes, even without polishing, presents a beautiful and pleasing appearance (Tr. 26, 39, 46; Exs. A, B, C);

1/ The Department of the Interior's Dictionary of Mining, Mineral and Related Terms (1968) defines geode at page 487 as:

"a. A hollow nodule or concretion, the cavity of which is commonly lined with crystals of calcite or quartz; some are lined with smooth chalcedony or limonite. Most are formed of crystalline silica which may or may not have a shell of chalcedony, others are composed of limonite, colemanite, celestite, barite, or other minerals, and most have been formed in shales or other soft rocks. * * * Fay; Hess. b. The cavity in a geode. Webster 3d."

> that the geodes are obtained in what would be considered a typical mining operation (Tr. 58, 114, 115, 120); and that the geodes can be and are sold at remunerative prices (Tr. 55, 58, 97).
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> One of the contestees testified that he sells the geodes uncut for forty-five cents per pound wholesale with the purchaser paying the shipping costs (Tr. 97, 110, 111, 115); that with a large backhoe that he has on the claims, he can recover as much as one ton of geodes in two hours (Tr. 97, 124); and that his mining costs are in the neighborhood of twelve to fifteen cents per pound of geodes (Tr. 108).

During their testimony, the appellees described the various uses of geodes. Cut and polished geodes, both solid and hollow, are used for decorative purposes in homes and stores (Tr. 59, 89), and are also used for bookends, desk pen and pencil sets, and bases for lamps and other objects (Tr. 88, 99). The solid-interior geodes can be cut up, polished and made into typical gemstone products such as rings, necklaces and bolo ties (Tr. 68, 81, 98-99).

[1] The initial issue is whether geodes are a mineral subject to location under the mining laws. The hearing produced no evidence from which a conclusion may be drawn that geodes should not be considered subject to location. Therefore, we must examine Departmental policy on the locatability of geodes and on the general principles of locatability, as expressed in prior decisions. BLM argues that the decisions in South Dakota Mining Company v. McDonald, 30 L.D. 357 (1900); Earl Douglass,

44 L.D. 325 (1915); and United States

v. Bienick, 14 IBLA 290 (1974), are dispositive of this issue. However, we find no definite ruling in these decisions, nor in other Departmental decisions, that geodes are not subject to location.

An examination of the decisions cited by BLM reveals that South Dakota Mining Company v. McDonald, supra, is the source for the suggestion that geodes are not locatable. In United States v. Bienick, supra, the mining claim was for gravel which the decision found to be a common variety. The opinion briefly stated at 296:

> * * * As to the sales of crystalline deposits, such specimens are valuable as natural curiosities but are not subject to location under the mining law. * * *

The only authority cited for this proposition is the South Dakota decision. Administrative Judge Stuebing, in his concurring opinion, points out that the claimants had advertised for the sale of the crystals for 3 months, and that the total sales amounted to about $300. United States v. Bienick, supra at 303. There is no indication the claimant could even recoup his costs from such sales. It is apparent from reading the entire decision in Bienick that a general finding was made that there was not a valuable mineral deposit within the claims because mineralization was not sufficient to support the discovery of a valuable mineral deposit. The decision does not provide a ruling that crystalline deposits are never subject to location. Further, the decision did

not involve geodes, so it is not a precedent for a holding on deposits of geodes.

The decision in Earl Douglass, supra, ruled that fossil remains of prehistoric animals are not materials recognized as mineral by standard authorities. The decision cited South Dakota for the principal that land containing formations and material valuable as natural curiosities, but not mineral substances usually developed by mining operations, is not mineral land within the meaning of the mining laws.

South Dakota Mining Co. v. McDonald, supra, stands, therefore, as the only case brought to our attention that actually involved geodes. We must examine the circumstances and language of that decision in order to ascertain what policy guidelines were being set forth, and if it is a clear precedent for holding that geodes cannot be located under the mining laws.

In South Dakota, two parties claimed land which contained a cavern described as a great natural wonder. One party sought the land under the homestead laws and the other under the mining laws. The mining claimant protested against the homestead entry asserting the land to be mineral in character and the homestead entry fraudulent. After initial consideration, the Department ordered a further hearing on the issues in the case, stating, as quoted at 30 L.D. 359:

> This action is not to be construed as a determination of the question, so ably argued by the attorneys on each side, as to whether land chiefly valuable for its crystalline deposits can be entered under the mining laws of the United States.

After the second hearing, the Commissioner of the General Land Office (predecessor of the Bureau of Land Management) found the land to be nonmineral in character but held the homestead entry for cancellation because there was insufficient evidence of cultivation and improvement to establish the good faith of the entryman as a homestead claimant. On appeal, these findings were sustained. As pertinent to the question involved here, there is only the following discussion at 30 L.D. 360 sustaining the finding of nonmineral character of the land:

> Large quantities of crystalline deposits, and formations of various kinds, such as stalactites, stalagmites, geodes, "box-work," "frost-work," etc., etc., are found in the cavern. Specimens of these deposits and formations have been made the subject of sale at remunerative prices by the contending parties, not as minerals but as natural curiosities. Charge has also been made for admittance to the cavern and for the privilege of viewing its many natural wonders. The record clearly demonstrates that it is the source of revenue which these things furnish that the respective parties are striving to control.
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> The testimony introduced by the protestant company for the purpose of showing that the cavern contains valuable deposits of gold, marble, building stone, paint rock, and other mineral substances, falls far short of proving the land to be mineral in character within the meaning of the mining laws. It is not shown to contain deposits, in paying quantities, of any of the substances mentioned, or of any other substance such as is usually developed by mining operations. No serious effort has

> ever been made to develop the land, or any part of it, as a mining claim. The decision of your office holding the land to be non-mineral is clearly correct.

The question which was left open when the second hearing was ordered, i.e., whether land chiefly valuable for crystalline deposits may be considered mineral in character, was not resolved by the Departmental decision after that hearing. The two paragraphs quoted above do not answer the question. Instead, it is apparent that the finding of nonmineral character of the land was based upon the lack of a good faith mining operation. The exploitation of the cave and its contents were considered as outside a normal mining operation. The decision recommended action to reserve the cave for the general public, which subsequently was accomplished. The case should be considered in light of the peculiar circumstances presented there and the interest in preserving for the public the unique values of the cave. We do not believe the case is a precedent for the proposition that no crystalline deposits, including deposits of geodes, can ever be considered locatable under the mining laws.

Under the mining laws, "lands valuable for minerals" are reserved from sale, unless otherwise authorized by law. R.S. § 2318, 30 U.S.C. § 21 (1970). Lands in which "valuable mineral deposits" are found may be occupied and purchased and such deposits are open to exploration and purchase. R.S. § 2319, 30 U.S.C. § 22 (1970). Interpretations of these two quoted phrases are the sources for determining the locatability of particular substances

under the mining laws. Often, these interpretations have arisen in the context of a determination of the mineral character of the land. From such cases, the classic definitions of "mineral" and "locatability" have stemmed. For example, the Supreme Court in Northern Pacific Railway v. Soderberg, 188 U.S. 526, 536-37 (1903), struggled to find a definition of the words "mineral lands" and concluded that at least they include "not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture." Layman v. Ellis, 52 L.D. 714 (1929), relied on this and other definitions, including the following quotation (at 719-20) from Lindley on Mines, section 98, where it is stated:

> The mineral character of the land is established when it is shown to have upon or within it such a substance as –
>
> (a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or –
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> (b) Is classified as a mineral product in trade or commerce; or –
>
> (c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts; –
>
> And it is demonstrated that such substance exists therein or thereon in such quantit[i]es as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.

Both Congress and the Department have further delimited what mineral materials are subject to location. The Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 et seq. (1970), provides for leasing land, rather than the location of mining claims, for certain mineral materials. Section 3 of the Surface Resources Act of 1955, 30 U.S.C. § 611 (1970), removes common varieties of certain minerals from the operation of the mining laws. The Department has settled on a policy with regard to certain "non-validating uses." For example, mineral material of indiscriminate nature used only for road base, fill or similar purposes for which almost any earth material may be used has consistently been declared not subject to location under the mining laws. E.g., United States v. Harenberg, 11 IBLA 153, 156 (1973); United States v. Barrows, 76 I.D. 299, 306 (1969), aff'd, Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971). Similarly, agricultural soil additives which have no chemical effect on the soil but are merely physical amendments are not subject to location. United States v. Robinson, 21 IBLA 363, 82 I.D. 414 (1975); United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972). Note by contrast, for example, the following disparate materials which have been determined minerals subject to location: diamonds, 14 Op. Atty. Gen. 115 (1872); marble, Pacific Coast Marble Co. v. Northern Pacific R.R. Co., 25 L.D. 233 (1897); guano, Richter v. Utah, 27 L.D. 95 (1898); and onyx, Utah Onyx Development Co., 38 L.D. 504 (1910).

There is no doubt that a geode is composed of recognized mineral substances which would be individually locatable under the mining laws unless found to be a common variety subject to 30 U.S.C. § 611 (1970). The testimony at the hearing indicated that geodes possess an economic value in trade and the ornamental arts, apart from whatever commercial value may be attributed to their uniqueness as a so-called "natural curiosity." The appellees testified that the geodes are removed through mining operations which they conduct or which are conducted by third parties with the particular appellee receiving a share of the geodes removed (Tr. 56-59, 113-15, 120).

It is evident from the testimony at the hearing that geodes have a value in their raw state in addition to any enhanced value from subsequent processing or craftwork. Cf. United States v. Alexander, 17 IBLA 421, 433-34 (1974); United States v. Stevens, 14 IBLA 380, 391, 81 I.D. 83, 87 (1974). The record indicates the appellees are using the claims for the mining of geodes, and not simply using the claims for other purposes. Cf. United States v. Stevens, supra at 392-93, 81 I.D. at 88-89; United States v. Elkhorn Mining Co., 2 IBLA 383 (1971), aff'd., Elkhorn Mining Co. v. Morton, Civil No. 2111 (D. Mont., January 19, 1973). For these reasons we distinguish South Dakota Mining Co. v. McDonald, supra, from the present case.

We find no justification for ruling that geodes per se are not subject to location under the mining laws. Where a mining claimant has located his claim on a sufficient quantity of geodes and is conducting actual mining operations to extract the geodes, we hold that such a mineral deposit is subject to location under the mining laws. Furthermore, there is simply no evidence upon which we could make a finding that these deposits of geodes are not valuable mineral deposits. We are not, however, ruling that the claims are valid, but only that the Government's contest complaints must be dismissed because there is no evidentiary basis to support the charges. Cf. United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

[2] BLM next argues that Judge Mesch erred in ruling that the issue of common variety was not raised in the contest complaints. In its conclusion, BLM also asserts that the Judge erred in not invalidating the claims as lode locations on placer material. Since the Judge actually dismissed the proper location issue as not raised in the contest complaint, we will consider both issues together.

The content of contest complaints is governed by regulations which, among other things, require a "statement in clear and concise language of the facts constituting the grounds of the contest." 43 CFR 4.450-4(a)(4). The purpose of this requirement is to give the contestee sufficient notice of the charges to prepare his case.

The BLM contest complaints, supra, charge lack of discovery, nonlocatability of geodes and nonmineral character of the land. Such charges raise a variety of issues. They do not, however, raise the issue of a lode location on placer material. Nor was this issue properly raised at the hearing. We therefore affirm Judge Mesch's ruling dismissing this issue as not included within the contest complaints, without reaching any conclusion as to the merits of this particular allegation. See United States v. McElwaine, 26 IBLA 20 (1976).

The issue of common variety, however, was raised during the direct examination of the BLM mining engineer (particularly Tr. 30-33). Appellees' counsel cross-examined this witness on this precise point (Tr. 35-37). Questions relating to this issue were asked during the appearances of the appellees as witnesses (e.g., Tr. 71, 74, 76-77, 78-79, 91). No objection was made at any time during the hearing and no prejudice has been asserted by appellees concerning the introduction of this issue. A matter which is raised without objection at the hearing, and of which the contestee is fully aware, may be considered by the Administrative Law Judge in reaching his decision. United States v. Alexander, supra at 421, 430-31; United States v. Harold Ladd Pierce, 75 I.D. 270, 275-78 (1968). We therefore find that the issue of common varieties was presented and that Judge Mesch erred in his ruling that it was not.

[3] "Common varieties of sand, stone, pumice, pumicite [and] cinders" are declared not to be valuable mineral deposits within the meaning of the mining laws by section 3 of the Surface Resources Act of 1955, 69 Stat. 368, as amended, 30 U.S.C. § 611 (1970). In order for a variety of one of these materials to be classified as "uncommon," and therefore subject to location, it must meet two criteria: (1) the deposit must have a unique property; and (2) the unique property must give the deposit a distinct and special value. United States v. Beal, 23 IBLA 378, 395 (1976); United States v. U.S. Minerals Development Corp., 75 I.D. 127 (1968).

The evidence presented by BLM that geodes are a common variety consisted entirely of testimony by the BLM mining engineer that geodes are common to the claim area (Tr. 33), that similar geodes are found in other parts of the country (Tr. 24-26), and that geodes are composed of material from the "quite common" quartz family (Tr. 48). However, the mining engineer also testified that geodes do not occur "prolifically" (Tr. 34), and he agreed that when compared to "regular stones," geodes are "somewhat unique and uncommon" (Tr. 37).

The Government's prima facie case that the geodes are a common variety rests only upon a comparison of this deposit with geodes from other areas. The evidence of the Government witnesses comparing the geodes with other stone formations, however, tends to show that the geodes do not occur in abundance in nature and are

not widespread in their occurrence generally. This is unlike sand and gravel deposits and many building stone deposits which are widely spread and in large abundance generally. It was such deposits that the Act of July 23, 1955, was intended to make nonlocatable. The contestees' evidence emphasized the peculiar physical properties of these geodes and the special economic values attributable to those properties and to the deposits on these claims in such quantities that they assert mining operations are feasible. From the state of the record, we must conclude that the deposits of geodes, and the geodes themselves, have unique properties which give them a special and distinct value. The fact that the geodes may be similar to geodes from other areas which have similar properties and values is not sufficient alone to establish that the deposit of geodes is a common variety of stone within the meaning of the Act of July 23, 1955.

Whenever the Government contests a mining claim, it has assumed the burden of presenting a prima facie case on the charges in the complaint; the burden then falls on the mining claimant to rebut by a preponderance of the evidence such prima facie case. United States v. Bechthold, 25 IBLA 77, 82 (1976); United States v. Beal, supra at 393; United States v. Taylor, supra. Here, BLM has not appealed the holding of Judge Mesch that no prima facie case was presented on the issue of valid discovery. We see no basis for changing that holding. The appellees preponderated on the issue of common variety. We therefore affirm the decision of Judge Mesch

in dismissing the contest complaint without reaching any conclusion as to the actual validity of the mining claims.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Joan B. Thompson
Administrative Judge

We concur:

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Newton Frishberg
Chief Administrative Judge

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Martin Ritvo
Administrative Judge